Inherent.Com v. Martindale Hubbell et al Doc. 4

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REED ELSEVIER, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INHERENT.COM aka INHERENT, INC. Plaintiff, v. MARTINDALE-HUBBELL, LEXIS/NEXIS INC. and DOES 1 through 200 inclusive, Defendants.	No. C 05 3515 MHP **DEFENDANTS' APPLICATION FOR LEAVE OF COURT TO FILE MOTION TO DISMISS, OR ALTERNATIVELY TO TRANSFER ACTION** Complaint Filed: July 29, 2005

Pursuant to Standing Order No. 4 of the Honorable Marilyn H. Patel and Federal Rule of Civil Procedure 81(c), defendants Martindale-Hubbell and Lexis/Nexis, divisions of Reed Elsevier, Inc. (collectively "Defendants"), hereby request leave to file a motion to dismiss the complaint in this action ("Complaint") (which was removed to this Court pursuant to a Notice of Removal filed on August 30, 2005) pursuant to the "first to file" doctrine, or in the alternative, to transfer this case pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interests of justice, or dismiss the present Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure §§ 12(b)(6) and 9(b) for failure to plead allegations of fraud with particularity (collectively, the "Motion").

BACKGROUND FACTS

On July 29, 2005, plaintiff Inherent.com aka Inherent, Inc. ("Plaintiff") filed its Complaint

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for Declaratory Relief, Breach of Contract, and Fraud against Defendants in the Superior Court of the State of California, County of San Francisco, Case No. CGC 05443573, entitled Inherent.com aka Inherent v. Martindale-Hubbell et al. (the "State Court Action"). The first date upon which Defendants received a copy of the such Summons and Complaint was August 1, 2005, through the attempted, although potentially defective, service of process on Reed Elsevier, Inc.

On August 30, 2005, and within thirty days of the first date of receipt of a copy of the Summons and Complaint by any Defendant, Defendants timely filed a Notice of Removal pursuant to 28 U.S.C. § 1446(b).

This Court has original jurisdiction over Plaintiff's Complaint pursuant to 28 U.S.C. § 1332, because this civil action involves citizens of different states and the matter in controversy exceeds the sum of $75,000, exclusive of interests and costs, because, among other things, Plaintiff alleges in its Complaint that Defendants breached a contract whereby Defendants agreed to purchase Plaintiff for the sum of $780,000. Plaintiffs' claim may be removed by Defendants pursuant to the provisions of 28 U.S.C. § 1441(a) and (b).

Defendants are informed and believe that Plaintiff was incorporated under the laws of Oregon at the time the State Court Action was filed, and still is, a citizen of the State of Oregon, with its principal place of business in Portland, Oregon. Martindale-Hubbell and Lexis/Nexis are not legal entities, but divisions of Reed Elsevier, Inc. At the time of the filing of the State Court Action, Reed Elsevier, Inc., was and still is, incorporated under the laws of the State of Massachusetts, with its principal place of business and headquarters located in Newton, Massachusetts. Martindale-Hubbell's principal place of business is New Providence, New Jersey, and the principal place of business of Lexis/Nexis is Miamisburg, Ohio. The Complaint also names certain Doe Defendants 1-200. Pursuant to 28 U.S.C. § 1441(a), the citizenship of such fictitious Doe defendants shall be disregarded for purposes of removal.

Defendant is informed and believes that the amount in controversy in this action, exclusive of interest and costs, exceeds the sum of seventy-five thousand dollars ($75,000). In the State Court Action, among other things, Plaintiff alleges that Defendants entered into an agreement with Plaintiff to purchase Plaintiff for a total sum of $780,000.00 and also agreed to hire certain key

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employees of Plaintiff. Plaintiff claims that Defendants breached the contract by not fulfilling its duties under the parties' purported purchase contract, Defendants never intended to purchase Plaintiff, and Defendants allegedly used unspecified trade secrets of Plaintiff to obtain some supposed unfair advantage. The Complaint alleges that Defendants contend that no firm or binding contract existed between the parties. Accordingly, Defendants is informed and believes that the amount in controversy exceeds $75,000.

Defendants properly removed the State Court Action to this Court because diversity of citizenship exists between Plaintiff and Defendants and the matter in controversy between them is in excess of $75,000. Accordingly, this Court has original jurisdiction over this action, pursuant to 28 U.S.C. § 1332. Venue lies in the United States District Court for the Northern District of California, San Francisco Division, pursuant to 28 U.S.C. § 1441(a) because the State Court Action was filed and is pending in this district.

REQUEST FOR LEAVE OF COURT

Pursuant to Federal Rule of Civil Procedure 81, Defendants' response to Plaintiff's Complaint is due on September 7, 2005, and rather than answer the Complaint, Defendants' seek to dismiss the Complaint. Defendants seek to file their Motion to dismiss the Complaint in the present action on the grounds that another action, which was filed prior to the present action, involving the same parties and same facts is already pending in the United States District Court for the District of New Jersey, and the Court should dismiss this action pursuant to the "first to file" doctrine. In the alternative, Defendants seek an order transferring this action to the District of New Jersey pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interests of justice, or dismissing the present Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure §§ 12(b)(6) and 9(b) for failure to plead allegations of fraud with particularity.

Defendants' Motion shall be based on the accompanying Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Michael Little, Timothy Corcoran, Mark E. Duckstein and Fernando Marinez, the Request for Judicial Notice, and supporting documents, all pleadings, records, and papers on file in this action, and such further evidence and

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arguments as may be presented to the Court on or before the hearing on the Motion.

Among other reasons, Defendants contend that their Motion should be heard before the Case Management Conference for the reasons stated in the Notice of Motion, Memorandum in support of such Motion, and accompanying pleadings and papers, and in the interests of judicial efficiency in light of the substantially similar action pending between the same parties in the District of New Jersey, and so that the parties can avoid additional burden and expense in litigating two actions in two jurisdictions regarding the same facts and the same issues, among other reasons. Moreover, Plaintiff should have sufficient time to respond to Defendants' Motion which Defendants request to be heard on October 31, 2005. Pursuant to Local Rule 7-2, and Standing Order No. 1, Defendants request that the Court schedule its Motion for hearing on October 31, 2005, at 2:00pm or as soon thereafter as the matter may be heard by the Court. According, Defendants assert that there is good cause for granting leave as requested in this application.

DATED: September 7, 2005

SHARTSIS FRIESE LLP

By: */s/ Zesara C. Chan*
ZESARA C. CHAN

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